

**MEMORANDUM ON INTERLOCUTORY APPEAL**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

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Case No. 2017-CP-23-07837

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BLACKSTONE AND CHASE, LLC,  
MARK T. THOMAS, TENSLE E.  
THOMAS, AND BRADLEY W. KERR,

Appellants,

v.

MARGARET H. DURHAM LIVING  
TRUST, MULTIPLEX SYSTEMS, INC.,  
ICE RINK ENGINEERING AND  
MANUFACTURING COMPANY, LLC,  
EZ GLIDE 350, LLC, MARGARET H.  
DURHAM, JAMES W. DURHAM,  
HELEN W. SHOCKLEY, AND  
TAMALA D. CRANE,

Respondents

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ATTORNEYS FOR THE RESPONDENTS

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## RESPONDENTS' MEMORANDUM ON INTERLOCUTORY APPEAL

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### RECITATION OF THE LAW

"An appeal ordinarily may be pursued only after a party has obtained a final judgment." *State v. Wilson*, 387 S.C. 597, 599, 693 S.E.2d 923, 924 (2010) (citing *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005) (citing *Mid-State Distribs., Inc. v. Century Imps., Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993); S.C.Code Ann. § 14-3-330(1) (1976); Rule 72, SCRCF; and Rule 201(a), SCACR)). A "'Final judgment' is a term of art referring to the disposition of all the issues in the case." *Doe v. Howe*, 362 S.C. 212, 216, 607 S.E.2d 354, 356 (Ct. App. 2004). "A final judgment is one that ends the action and leaves the court with nothing to do but enforce the judgment by execution. An order reserving an issue, or leaving open the possibility of further action by the trial court before the rights of the parties are resolved, is interlocutory." *Tillman v. Tillman*, 420 S.C. 246, 249, 801 S.E.2d 757, 759 (Ct. App. 2017) (internal citations omitted). "[A]n order which does not put a final end to the case, nor establish any principle which will finally affect the merits of the case, nor deprive the party of any benefit which he may have at a final hearing, ought to be considered an interlocutory order, from which no appeal ought to be allowed." *Robertson v. Bingley*, 6 S.C. Eq. (1 McCord Eq.) 333, 351 (Ct.App.1826)) as cited in *Tatnall v. Gardner*, 350 S.C. 135, 138 564 S.E.2d 377, 379 (2002).

"The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by section 14-3-330 of the South Carolina Code. An order generally must fall into one of several categories set forth in that statute in order

to be immediately appealable.” State v. Wilson, 387 S.C. 597, 599, 693 S.E.2d 923, 924 (2010) (citations omitted).

Section 14-3-330 provides the following types of judgments, decrees, and orders are directly appealable:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions ...;

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;

(3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and

(4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver. *Id.*

In the filed Appeal, the Trial Court Order does not discontinue the action, affect a new trial, or strike out any part of a pleading or action (subsection 2), “was not entered in a special proceeding (subsection 3), [and] does not involve an injunction or a receiver in the court of common pleas (subsection 4)” *Id.* at 925. The question is whether the Trial Court Order falls within the provisions of subsection (1), i.e., whether it involves “the merits in

actions commenced in the court of common pleas and general sessions.” S.C. Code Ann. § 14-3-330(1) (1977).

An order ‘involves the merits,’ as that term is used in Section 14-3-330(1) and is immediately appealable when it finally determines some substantial matter forming the whole or part of some cause of action or defense. The phrase ‘involving the merits’ is narrowly construed in modern precedent. An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties’ rights. *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 7, 630 S.E.2d 464, 467-468 (2006) (citations omitted).

In discussing the meaning of an order “involving the merits” the Supreme Court stated in *Mid-State Distributors, Inc. v. Century Importers, Inc.* that such an order “must finally determine some substantial matter forming the whole or a part of some cause of action or defense.” 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993) (quoting *Jefferson by Johnson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 318, 368 S.E.2d 456, 456 (1988)(internal quotation marks omitted). In essence, the party must arrive “at the end of the road” for a decision to be appealable. *Id.* “If there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory.” *Id.* at 335.

## ARGUMENT

Appellants have not reached ‘the end of the road.’ The decision appealed from is a denial of Appellants Motion to Strike and Motion to Dismiss Defendants’ Answer and Counterclaim. The Court’s denial of the Motion to Strike and the Motion to Dismiss is

analogous to the trial court's refusal to dismiss defendant for lack of personal jurisdiction in *Mid-State Distributors, Inc. v. Century Importers, Inc.* The Appellants have "forfeited nothing, they must simply continue to trial." *Id.*

In addition to their written motion, Appellants made an oral motion for summary judgment and judgment on the pleadings regarding the existence of a lease and Appellants' eviction thereunder. Though noting that there are still many "issues [that] necessitate discovery and later determination by the finder of fact", the Trial Court determined that a written lease existed between the parties which applies to the case in instance. Order, *Blackstone and Chase, LLC et al. v Margaret H. Durham Living Trust et al.*, No. 2017-CP-23-07837 (Judge G. Thomas Cooper, Jr., October 3, 2018). The Order does not settle the case, but leaves the issues open for further action after discovery. Where an order is not final, but some further action must be taken by the court to determine the rights of the parties, the order is interlocutory. See *Ex parte Farrars*, 13 S. C. 254, 259-260 (1880).

Appellants' other issues raised for summary judgment and judgment on the pleadings were denied, and it is accepted law that "the denial of a motion for summary judgment is not appealable, even after final judgment." *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003).

The Trial Court's ruling upon the existence of a lease and its enforceability before hearing the remainder of the case is analogous to *Stone v. Thompson* where the family court first determined the existence of a common law marriage before addressing divorce and division of assets. Appellate Case No. 2014-001488, Opinion No. 5459 (S.C. App., 2016) ("In this case, the issue of common law marriage was a preliminary matter for the family court to determine before reaching Stone's requests for divorce and division of the marital

estate. The family court merely exercised its discretion to bifurcate the trial to save time and resources on the remaining issues if it found that a common law marriage did not exist.”). Here the Trial Court has only taken the first step in determining the rights of the parties; considering the issue of contractual relations between the parties. The Trial Court must now proceed on towards a final judgment.

“An interlocutory order is appealable under subsection (1) only if it involves the merits, that is, ‘finally determines some substantial matter forming the whole or a part of some cause of action or defense...’” *Jefferson by Johnson v. Gene's Used Cars, Inc.*, 295 S.C. 317,318, 368 S.E.2d 456, (1988)(quoting *Henderson v. Wyatt*, 8 S.C. 112 (1877)). The Order at hand does not finally determine all or part of the action. While the lease has been held to exist, the Trial Court has not applied it to the facts of the case. Rather, the Trial Court has merely determined that the lease is valid and enforceable *and that further discovery and determination by the finder of fact is necessary*. The parties must now proceed to further litigation and trial; to apply said lease and to have it interpreted. Appellants have not reached ‘the end of the road’; they “must simply continue to trial.” *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993).

An interlocutory Order that does not finally settle some cause of action or defense is not appealable under S.C. Code Ann. § 14-3-330(1). In the underlying action Appellants have yet to answer the counterclaims of Respondents and to bring an appeal now encourages trial in piecemeal. “Piecemeal appeals should be avoided because most errors can be corrected through a new trial.” *Energys Del., Inc. v. Hopkins*, 401 S.C. 615, 616-617, 738 S.E.2d 478, 479 (2013).

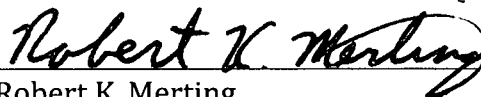
## CONCLUSION

The rights of the parties have not been determined, and the Trial Court will have to take further action to end this case. In short, the order is Interlocutory, does not involve the merits, and is not subject to appeal. See *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777 (1993) (holding an interlocutory order is generally not directly appealable).

Appellants' remedy is not to bring this appeal, but to proceed to trial. Only upon the issuance of a final judgment will Appellants be able to raise this appeal and an appeal of all other alleged errors. To allow interlocutory appeals that are not a final ruling upon the merits is a waste of judicial resources and an unnecessary delay in the final determination of the case.

Respectfully Submitted,

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ATTORNEYS FOR THE RESPONDENTS

South Carolina  
Date: January 30, 2019

**PROOF OF SERVICE**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
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G. Thomas Cooper, Jr., Circuit Court Judge

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This is to certify that the undersigned attorney for the Respondents did cause the following documents:

A) Respondents' Memorandum on Interlocutory Appeal

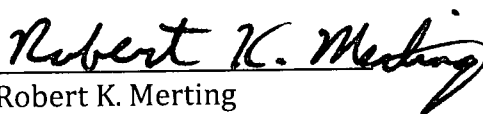
to be served upon the parties listed below, by mailing a copy via first class mail on the 30th day of January, 2019 in the US Mail, in an envelope addressed as follows:

For: Blackstone and Chase, LLC  
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Tensley E. Thomas  
Bradley W. Kerr

To: Dickson Davis Law Firm, LLC  
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January 30, 2019

The South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

Re: Blackstone and Chase, LLC et al. vs. Margaret H. Durham Living Trust et al.  
Appellate Case No. 2018-001976

Dear Ms. Allen:

In response to your January 23, 2019 letter, please find enclosed Respondents Memorandum on the Interlocutory Appeal. A copy of this Memorandum has been served upon Ms. Davis.

If I can provide any further information or documentation, please do not hesitate to contact me directly.

Sincerely,

Robert K. Merting  
R. K. Merting, LLC – Attorney at Law

enclosures

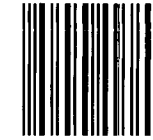
cc: Deborah Dickson Davis

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